1981 is not "evidence in support of a defence of alibi", and it makes no difference whether the approximate time given in the charge is "about 8.00 p.m." or "about 8.30 p.m.". Any evidence to be adduced by the defence on the whereabouts of the accused on the evening of 3 April 1981, showing or tending to show that by reason of his presence elsewhere, he was not or was unlikely to have been at Jalan Tun Fuad, Kota Kinabalu and therefore would be essentially inconsistent with his participation in the crime, must be excluded unless prior notice has been given. The exclusion of the alibi evidence in this particular case was therefore correct in law.

We would hasten to add that if alibi notice had been served in relation to the original charge, then the accused would be under no duty pursuant to the provisions of section 402A to serve a second notice merely because the prosecution had elected to amend the charge at the commencement or in the course of the trial. In such a situation, any evidence of the whereabouts of the accused on another occasion or not relative to the evening of 3 April 1981 could continue to be excluded from the restriction notwithstanding any subsequent amendment of the charge. In short, evidence of the whereabouts of the accused on a particular occasion which would have been admissible without notice under the original charge would not become inadmissible as a result of the charge being subsequently amended in such manner as to render that particular occasion as the amended time of the alleged commission of the crime.

Having regard to the facts and circumstances of this case, in particular the nature of the offence, the particulars given in the charge, the materiality of the amendment, and the type of alibi evidence intended to be adduced, we are of the opinion that the second question posed should also be answered in the negative.

Solicitors: *Ghani & Co.*

HAJI P. SHAUKAT ALI BIN GHANI & ORS. v. LEE KHENG GNOH

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Wan Hamzah S.C.JJ.) 13 October 1987 & 22 April 1988]

[Kuala Lumpur – Supreme Court Civil Appeal No. 425 of 1986]

Civil Procedure – Originating petition – Company – Summons for directions – Order in terms – Appeal – R.H.C. 1980, O. 25 & O. 88 – Companies Act 1965, s. 181.

In this case, the respondent had brought an originating petition relating to a company (the third appellant) in which she and the first and second appellants were the directors. The respondent complained that the first and second appellants "have wantonly and discriminately conducted the affairs of the company in a manner burdensome, harsh, wrongful and oppressive to the petitioner in utter disregard to her rights and interests as a shareholder". The respondent-petitioner filed a summons for directions and an order in terms was made. The appellants appealed and at the appeal relied on three grounds of appeal: (a) that the learned judge erred in allowing the petition to be amended by adding the third appellant as a party; (b) that the learned judge erred in law in making a substantive order, that is, in directing that certain moneys due to the company be paid into court; (c) that the learned judge erred in directing that (i) the statements in the affidavit of the respondent-petitioner be admissible in evidence at the trial without calling as a witness the maker of the statements and (ii) the evidence of certain facts be received at the trial by statements on oath of information and belief.

Held, allowing the appeal: (1) the order for adding the third appellant company as a party was a separate order made at the hearing of a separate application. No notice of appeal appeared to have been filed against that order;

(2) the order made by the learned judge and which was complained of was an order on a substantive matter under one of the prayers in the original petition and should not have been made at the hearing of the summons for directions brought under Order 88 or Order 25 of the Rules of the High Court. The matter should be considered at the trial and should be deleted from the order;

(3) it is up to the respondent-petitioner whether to give oral evidence at the trial or not but the appellants, at the hearing of the petition, should not be prevented from cross-examining her on her statements in the affidavit. The order made should be read subject to the right of the appellants to cross-examine;

(4) The respondent-petitioner has to prove the facts in accordance with the law of evidence and hearsay evidence is inadmissible. The direction allowing such hearsay evidence must therefore be deleted from the order.

SUPREME COURT.

M. S. Murthi for the appellants.

Allen T. Muttiah for the respondent.

Cur. Adv. Vult.

Wan Hamzah S.C.J. (delivering the judgment of the court): Originating Petition No. 2 of 1985 was brought by Lee Kheng Gnoh (the petitioner) originally only against Haji P. Shaukat Ali bin Ghani (the first respondent in the High Court petition) and Mohamed Abdul Kader a/l Shaukat Ali (the second respondent in the High Court petition). Subsequently, Shaukat Lliaisu Sdn. Bhd. was added as the third respondent. The facts set out in the petition are as follows. The shareholders of the third respondent company consist of the petitioner, the first respondent and the second respondent. Together, the first and the second respondents own 51% of the total shares. The petitioner complains that the first and the second respondents "have wantonly and discriminately conducted the affairs of the company in a manner burdensome, harsh, wrongful and oppressive to the petitioner in utter disregard to her rights and interest as a shareholder". The following are the particulars of the alleged wrongful manner in which they conducted the affairs of the company:

(a) failing to account for moneys received for and on behalf of the company;

(b) failing to render audited accounts of the company for the years 1980 to 1984;

(c) failing to serve notices of the annual general meetings to the petitioner for the years 1980 to 1983;

(d) failing to call an extraordinary meeting to ratify the disposal of the whole of the company's assets;

(e) depriving the petitioner of her rights as a shareholder;

(f) paying moneys due to the company into the account of the first respondent for his personal advantage.

The petitioner alleges that in January 1984, the first and the second respondents entered into an agreement with Phor Tay Sin Development Sdn. Bhd. for the sale to the company of land belonging to the third respondent for the price of $4,908,396 and she has not been able to ascertain in whose possession the proceeds of the sale are. The petitioner prays for an order against the first and the second respondents to pay into court all moneys belonging to the company and the price of the sale of the company's lands. She asks for an order that the first and the second respondents should buy up her shares at a fixed price. Alternatively, she prays that the company be wound up.

In September 1985, the petitioner filed summons for directions reference No. 1161/1985. On 22 September 1986, Mohamed Dzaiddin J. heard the summons and gave an order in terms. The respondents filed a notice of appeal dated 21 October 1986, and subsequently a memorandum of appeal dated 16 January 1987. When the appeal came up for hearing before us, the respondents (the appellants in this appeal) proceeded on three grounds of appeal only and abandoned the rest. First, it was contended that the learned judge erred in allowing the petition to be amended by joining the third respondent company as a party. However, as pointed out by counsel for the petitioner and as shown by the appeal record, the order for adding the third respondent company as a party was a separate order made on 28 October 1985 on the hearing of a separate application. The appeal record does not show that a notice of appeal was filed against that order.

Another ground of appeal is that the judge erred in law in making a substantive order. This refers to item no. 5 of the order, which directs that all moneys due to Shaukat Lliaisu Sdn. Bhd. by Phor Tay Sin Development Sdn. Bhd. be paid into court. It was contended by the respondents that the judge should not have made a substantive order but should have given merely directions as set out under Order 25 of the Rules of the High Court. In fact, the summons in this case was not a summons for directions under Order 25. The summons bears the heading "Summons for Directions Pursuant to Order 88" and correctly so as it was filed in a petition under section 181 of the Companies Act, *vide* rule 7(1) of Order 88. We agree with the respondents that item no. 5 is an order on a substantive matter under one of the prayers in the originating petition. In our judgment, a substantive order should not be made at the hearing of summons for directions brought either under Order 88 or Order 25. The matter under item no. 5 should be considered at the trial, and it should be deleted from the order.

Another ground of appeal is directed against items no. 6 and 7 of the order of 22 September 1986. Under item no. 6, it was directed that the statements in the affidavit of the petitioner, paragraphs 1 to 24 and paragraph 28, be admissible in evidence at the trial without calling as a witness the maker of the statements. The maker of the

statements means the petitioner herself. It is up to the petitioner whether to give oral evidence at the trial or not to do so, but the respondents should not be prevented from cross-examining her on her statements in the affidavit. Item no. 6 of the order should be read subject to the right of the respondents to cross-examine. Under item no. 7, it was directed that the evidence of certain facts specified therein be received at the trial by statements on oath of information and belief. This means that hearsay evidence of these facts would be admissible. Certainly the petitioner has to prove the facts in accordance with the law of evidence and hearsay evidence is inadmissible. That direction in item No. 7 should therefore be deleted from the order.

The appeal is allowed with costs here and in the High Court. The deposit should be refunded to the appellants.

Appeal allowed.

Solicitors: *Darshan Singh & Co.; Allen Muttiah & Co.*

MESSRS. HISHAM, SOBRI & KADIR v. KEDAH UTARA DEVELOPMENT SDN. BHD. & ANOR.

[O.C.J. (Edgar Joseph Jr. J.) 16 March 1988]

[Penang – Civil Suit No. 23-428-86]

Civil Procedure – Contempt proceedings – Consent order – Undertaking given soon after consent order – Alleged breach of consent order and undertaking – Application for committal of directors of company to prison for contempt – R.H.C. 1980, O. 45 r. 7(4), Form 87 Appendix A.

The first defendant was a company which purchased a certain piece of land. Consequent on this purchase, the first defendant applied for and was granted certain overdraft facilities from a bank. The plaintiffs were the solicitors for the bank. The second defendant, a legal assistant in the plaintiffs' firm, gave an undertaking to the vendors to deliver a bankers' guarantee. This undertaking was given in reliance upon a promise given by the first defendant to furnish to the plaintiffs the bankers' guarantee.

Thereafter, a consent order was obtained whereby the first defendant was ordered to deliver a bankers' guarantee. The directors and officers of the first defendant also undertook to comply with the consent order.

In the present application, the plaintiffs sought an order that the directors of the first defendant be committed to prison for the alleged contempt of court by having respectively breached their undertaking.

Held, dismissing the application: (1) this court accepted the uncontradicted explanation given by the alleged contemnors for failing to comply with the consent order as there was nothing improbable in it;

(2) there was more than a reasonable doubt raised in their favour and they were entitled to its benefit;

(3) the contemnors had not committed any wilful contempt of court.

Cases referred to:

(1) *Gordon* v. *Gordon* [1946] 1 All E.R. 247 (cited).
(2) *McIlraith* v. *Grady* [1968] 1 Q.B. 468, 477 (cited).
(3) *London & Birmingham Railway Co.* v. *Grand Junction Canal Co.* (1835) 1 Ry. & Can. Cas. 224 (cited).
(4) *Dent* v. *Dent & Hall* [1962] 1 All E.R. 746 (cited).
(5) *Ronson Products Ltd.* v. *Ronson Furniture Ltd.* [1966] 2 All E.R. 381, 384 (cited).
(6) *Re Tuck* [1906] 1 Ch. 692 (cited).
(7) *Century Insurance Co.* v. *Larkin* [1910] I.R. 91 (cited).
(8) *Haydon* v. *Haydon* [1911] 2 K.B. 191 (cited).
(9) *Arumugam* v. *Suppiah Chettiar* [1935] M.L.J. 4 (cited).
(10) *The Vanda* [1960] M.L.J. 283 (cited).
(11) *Dawkins* v. *Prince Edward of Saxe Weimar* (1875-76) 1 Q.B.D. 499, 501 (cited).
(12) *Alloy Automotive Sdn. Bhd.* v. *Perusahaan Ironfield Sdn. Bhd.* [1986] 1 M.L.J. 382, 385 (refd).
(13) *Fairclough & Sons* v. *Manchester Ship Canal Co.* (1897) 41 S.J. 225; [1897] W.N. 7 (cited).
(14) *Heaton's Transport* v. *T.G.W.U. Ship Canal Co.* [1973] A.C. 15 (cited).
(15) *Re Bramblevale Ltd.* [1969] 3 All E.R. 1062 (cited).

APPLICATION.

Foo Say Keow (*Charles Rajah* with him) for the plaintiffs.

S.P. Annamalai for the defendants.

Cur. Adv. Vult.

Edgar Joseph Jr. J.: This is a plaintiffs' application, by notice of motion, for an order that Lim Chau Seng, Ooi Liew See (f) and Mohd. Fauzi @ Mohd. Naim bin Haji Marzuki, described as directors of Kedah Utara Development Sdn. Bhd., be committed to prison for their alleged contempt of court by having respectively breached their undertaking given to the court on 16 February 1987 ("the undertaking") in the circumstances hereinafter appearing.